

STATE OF MICHIGAN
COURT OF APPEALS

LANCE SIDNEY BROOKS,

Plaintiff-Appellee,

UNPUBLISHED
March 13, 2003

v

GALE MARIE BROOKS,

Defendant-Appellant.

No. 244242
Iosco Circuit Court
LC No. 99-002149-DM

Before: Griffin, P.J., and Neff and Gage, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying her motion to change custody. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff and defendant are the parents of a daughter (DOB 5-6-97). The consent judgment of divorce awarded the parties joint legal and physical custody of the child, and provided that each party was to have one-half of the available parenting time in alternating seven-day periods. The judgment also provided that the parties were to cooperate in obtaining a psychological evaluation from Dr. Simmons, and that thereafter either party could request a child custody review hearing. Dr. Simmons' report recommended that plaintiff have primary physical custody of the child.

Plaintiff filed a motion to modify the custody provisions of the judgment of divorce and sought legal and physical custody of the child. Defendant opposed the motion, and sought primary physical custody of the child. The trial court commenced an evidentiary hearing, but adjourned the proceedings pending the resolution of felony parental kidnapping charges lodged against defendant.¹

Thereafter, the parties reached a settlement. The parties stipulated that plaintiff was to have sole legal custody of the child, but that they would continue to share physical custody. Defendant was to have parenting time from 9:00 a.m. to 6:00 p.m. Monday through Friday, and alternate weekends from 6:00 p.m. on Friday to 6:00 p.m. on Sunday. On those weekends when defendant traveled to visit her other children, her parenting time was to end at 4:00 p.m. on

¹ The record does not reveal if or in what manner these charges were resolved.

Friday. The parties agreed that the child's enrollment in kindergarten would constitute a sufficient change of circumstances to review parenting time.

Subsequently, plaintiff filed a motion for contempt/restricted visitation in which he alleged that defendant repeatedly violated the parties' agreement by appearing late for custody exchanges. Defendant denied plaintiff's allegations and filed a competing motion for change of custody, citing the child's enrollment in kindergarten as the basis for her request. Defendant alleged that she and plaintiff were unable to cooperate, and that it would be in the child's best interests to transfer primary physical custody to her.

The trial court held a hearing on the parties' motions. At the outset, the trial court concluded that defendant had not shown a sufficient change of circumstances to warrant a change of physical custody. However, the trial court agreed to hear testimony on the issue of parenting time. Subsequently, the trial court entered separate orders denying defendant's motion for change of custody and modifying defendant's parenting time.

A custody award may be modified on a showing of proper cause or change of circumstances that establishes that the modification is in the child's best interest. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). The party seeking a change of custody must establish proper cause or a change in circumstances before the existence of an established custodial environment and the best interest factors may be considered. *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994).

Three standards of review apply in custody cases. MCL 722.28. We review a trial court's findings of fact under the great weight of the evidence standard. A trial court's findings on the existence of an established custodial environment, as well as each custody factor, should be affirmed unless the evidence clearly preponderates in the opposite direction. We review a trial court's discretionary rulings, including custody decisions, for an abuse of discretion. We review questions of law for clear legal error. A trial court commits legal error when it incorrectly chooses, interprets, or applies the law. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

Initially, defendant argues that the trial court committed clear legal error by refusing to consider her motion to change physical custody in light of the undisputed evidence that she and plaintiff could not agree on matters related to the child. MCL 722.26a(1)(b). We disagree. A trial court must consider the ability of the parents to cooperate as required by MCL 722.26a(1)(b) when making an initial determination to create joint custody. *Wellman v Wellman*, 203 Mich App 277, 279; 512 NW2d 68 (1994). This case involves a request to change joint physical custody rather than a request to create joint custody. Defendant cited the parties' agreement that the child's enrollment in kindergarten could serve as the basis for a review of parenting time as the basis for her request to change custody. Child custody is distinguishable from parenting time. See, e.g., MCL 722.23; MCL 722.27; MCL 722.27a. Defendant did not point to a change of circumstances that would serve as a sufficient basis for a request for change of custody. *Rossow, supra*. No legal error occurred. *Phillips, supra*.

Defendant's argument that the trial court abused its discretion by changing her parenting time is not properly before this Court. We have jurisdiction over a claim of appeal from a postjudgment order affecting the custody of a minor. MCR 7.202(7)(iii); MCR 7.203(A)(1). If

an order covers multiple issues, an appeal is limited to the portion from which there is an appeal of right. MCR 7.203(A)(1). The trial court entered separate orders denying defendant's motion for change of custody and modifying defendant's parenting time. Defendant has not sought leave to appeal the order modifying her parenting time. MCR 7.203(B)(4). Thus, that issue is not properly us. However, even if we were to consider the issue, we could not conclude based on the record before us that the trial court abused its discretion by modifying defendant's parenting time. *Id.*

Furthermore, defendant argues that the trial court erred or abused its discretion by failing to admit Dr. Simmons' report. We disagree. Defendant does not cite to any point in the record at which the trial court refused to admit Dr. Simmons' report. Moreover, it appears that Dr. Simmons' deposition, to which his report was attached, was made part of the record. Defendant has not established that the trial court abused its discretion.

Finally, we decline to award sanctions as requested by plaintiff. An appeal is vexatious when it is taken for purposes of hindrance or delay or without any reasonable basis for belief that there is a meritorious issue to be determined on appeal. MCR 7.216(C)(1)(a); *Richardson v DAIIE*, 180 Mich App 704, 709; 447 NW2d 791 (1989). At a minimum, defendant legitimately sought review of the trial court's order denying her motion to change custody.

Affirmed.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Hilda R. Gage